Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 21NCVC-72–11 OF 2013
VAZEER ALAM MYDIN JC
29 MAY 2014

Constitutional Law — Attorney General/public prosecutor — Prosecutional discretion — Whether public prosecutor and his deputies immune from being sued for wrong exercise of prosecutorial discretion — Whether immunity did not apply if public prosecutor and deputies exercised prosecutorial discretion with malice or for improper purpose — Whether notion public prosecutor and deputies enjoyed absolute prosecutorial immunity anathema to modern-day notions of accountability and rule of law — Whether pleadings of claimant disclosed reasonable cause of action which merited trial and could not be summarily struck out under O 18 r 19 of the Rules of Court 2012

The High Court in the instant case was called upon to decide, probably for the first time, whether the public prosecutor (cum Attorney-General) of Malaysia and his deputies were absolutely immune from being sued in a civil court for abuse of prosecutorial discretion or power, malicious prosecution or misfeasance in public office if they had exercised their prosecutorial discretion with malice or for an improper purpose. In the instant case, the plaintiff, who was a Commissioner of Police and a former director of the commercial crimes investigation department in Bukit Aman, alleged that because of personal enmity the first and second defendants — who were, respectively, the public prosecutor ('PP') of Malaysia and the Inspector-General of Police at the material time — had towards him, they enlisted the aid of the third and fourth defendants – who were deputy public prosecutors acting under authority of the PP — and of various officers of the 10th defendant (the 'MACC' and successor to the former Anti-Corruption Agency ('ACA')) and the disciplinary unit of the police force to cause him to be investigated for various false allegations of crime in order to injure his reputation and character and cause his expulsion from the police force. The plaintiff alleged the defendants jointly or severally colluded amongst themselves to subject him to a series of investigations for alleged abuse of power, corruption and other crimes and caused him to be charged in court for various criminal offences from all of which he was finally acquitted on appeal. The causes of action raised against the defendants were for conspiracy, false and malicious investigation, abuse of power, abuse of prosecutorial discretion, malicious prosecution, prosecutorial misconduct and misfeasance in public office. These allegations were premised on the contention the defendants did not have any reasonable or probable cause to act against the

plaintiff; that their actions were actuated by malice and bad faith and/or with ill will, evil motive or personal spite or that they had acted intentionally or recklessly to injure the plaintiff without honestly believing he had committed any crime. The plaintiff claimed special, general, punitive, aggravated and exemplary damages for injury to his reputation, character and career and for the inconvenience, anxiety and expense he was put to as a result of the defendants' actions. Instead of filing a statement of defence to the plaintiff's claim, the defendants applied to have it struck out under O 18 r 19(1)(a) to (d) of the Rules of Court 2012 ('RC'). The grounds for the application were that (i) all causes of action pleaded in the statement of claim were time-barred under s 2(a) of the Public Authorities Protection Act 1948 ('PAPA') (ii) the statement of claim did not disclose sufficient and cogent particulars to support the various allegations made (iii) the 10th and 11th defendants were wrongly made parties to the suit as the 10th defendant was not in existence at the material time and the 11th defendant was not a legal entity which could be sued and (iv) the PP and his deputies (the third and fourth defendants) were absolutely immune from being sued in respect of the exercise of their prosecutorial discretion. At the material time, the third and fourth defendants were, respectively, the head and deputy director of prosecutions at the ACA, the fifth defendant was an officer with the disciplinary unit of the police force; the sixth defendant headed an investigative unit of the ACA while the seventh, eighth and ninth defendants were investigating officers with the ACA.

Held, dismissing the defendants' application with costs:

(1) The contention that the claims against the first, third and fourth defendants were unsustainable by reason of absolute prosecutorial immunity was unacceptable. Strong judicial pronouncements by eminent jurists in various jurisdictions confirmed the proposition that though the public prosecutor was ordinarily clothed with prosecutorial immunity, in exceptional circumstances where the prosecutor's conduct was fuelled by an improper purpose or motive, a motive that involved an abuse or perversion of the system of criminal justice for ends it was not designed to serve, or where the prosecutor stepped out of his constitutional role, that immunity was no longer justified. In such cases, civil action could lie against the public prosecutor (see paras 63, 74 & 86).

(2) The notion of absolute prosecutorial immunity for the public prosecutor and his deputies, who were all public officers, was anathema to modern-day notions of accountability and the rule of law. Unfettered exercise of power or discretion by public officials was not consonant with the rule of law. Public officers should be accountable for their actions for it was generally accepted that accountability promoted the rule of law. Whenever the Legislature provided for statutory immunity from legal proceedings for public officers, it always came with a rider that they must

have exercised their powers or discretion in good faith. The shield was never an absolute one (see paras 76 & 85).

(3) The pleadings disclosed reasonable causes of action which merited a trial. At this stage of the proceedings, it was not for the court to decide whether the various allegations raised in the pleadings were true or not. The allegations stood uncontroverted. In the absence of a statement of defence and there being no denial in the affidavit in support affirmed by the first defendant of the matters pleaded in the statement of claim, the court had to proceed as if the facts pleaded remained untraversed (see paras 24 & 77).

(4) It was inappropriate to strike out the statement of claim under O 18 r 19(1)(a) of the RC as it clearly disclosed several causes of action the facts for which were sufficiently pleaded and they were not inherently improbable or obviously unsustainable and justified the suit proceeding to trial (see para 42).

(5) All the causes of action raised in the statement of claim were filed well within the time stipulated in s 2(a) of the PAPA. In respect of the pleaded causes of action, time only began to run upon the dismissal of the various criminal appeals. The plaintiff could not have initiated civil proceedings against the defendants whilst the criminal proceedings were afoot as that would have been an indirect and collateral challenge on the criminal proceedings. He could only avail himself of the civil remedies once the criminal charges were determined with finality and that occurred when the appellate courts dismissed the appeals (see paras 51–52).

(6) There was no necessity to strike out the claims against the 10th and the 11th defendants. In the case of the former, although the MACC was not in existence at the material time, its predecessor, the ACA, was, and the acts complained of against some of the defendants were done in their capacity as officers of the ACA. By s 74 of the Malaysian Anti-Corruption Commission Act 2009, any act done or action taken by the ACA or its officers shall be deemed to have been continued by the MACC. Accordingly, the MACC, as the successor of the ACA, was, on the facts pleaded, properly made a defendant in this action. With regard to the 11th defendant, although it was not a legal entity, the plaintiff was prepared to amend the pleadings to substitute the Inspector-General of Police in place of Police DiRaja Malaysia as the 11th defendant. As the claim could be saved by the amendment, it should not be summarily struck out. This was in keeping with O 15 r 6 of the RC (see paras 87–88).

[Bahasa Malaysia summary

Mahkamah Tinggi dalam kes ini terpanggil untuk memutuskan, buat kali pertamanya, sama ada pendakwa raya (merangkap Peguam Negara) Malaysia

dan timbalan-timbalannya secara mutlak kebal daripada disaman dalam mahkamah sivil bagi salahguna budi bicara atau kuasa pendakwaan, pendakwaan berniat jahat atau bagi tujuan tidak wajar. Dalam kes ini, plaintif yang merupakan pesuruhjaya Polis dan bekas Pengarah Jabatan Penyiasatan Jenayah Komersil di Bukit Aman, mendakwa bahawa oleh kerana permusuhan peribadi, defendan pertama dan kedua — yang masing-masing merupakan pendakwa raya ('PP') Malaysia dan Ketua Inspektor Polis pada masa material — terhadap dirinya, mereka telah meminta bantuan defendan ketiga dan keempat – yang merupakan timbalan pendakwa raya bertindak di bawah kuasa PR — dan beberapa pegawai defendan ke-10 yang lain ('MACC' dan naib kepada bekas Badan Pencegah Rasuah ('BPR')) dan unit disiplin polis telah menyebabkan dia disiasat bagi pelbagai dakwaan jenayah yang salah untuk menjejaskan reputasi dan perwatakannya dan menyebabkannya dibuang daripada anggota polis. Plaintif mendakwa bahawa defendan-defendan secara bersama atau segelinitir, berkomplot sesama sendiri untuk mendedahkannya kepada satu siri penyiasatan bagi dakwaan salah guna kuasa, rasuah dan lain-lain jenayah dan menyebabkannya dipertuduh di mahkamah bagi pelbagai kesalahan jenayah yang kesemuanya melepaskannya atas rayuan. Kausa tindakan yang dibangkitkan terhadap defendan-defendan adalah bagi konspirasi, penyiasatan salah dan berniat jahat, salah guna kuasa, salah guna budi bicara pendakwaan, pendakwaan berniat jahat, salah laku pendakwaan dan misfeasans dalam pejabat awam. Dakwaan-dakwaan ini adalah bersandarkan pada dakwaan bahawa defendan-defendan tidak mempunyai apa-apa kausa munasabah atau mungkin untuk mengambil tindakan terhadap plaintif; bahawa tindakan-tindakan mereka digerakkan oleh niat jahat dan/atau motif jahat atau dendam peribadi atau bahawa mereka telah bertindak secara sengaja atau cuai untuk menjejaskan plaintif tanpa sebenarnya percaya bahawa dia telah membuat salah. Plaintif memohon bagi ganti rugi khas, am, punitif, teruk dan teladan bagi penjejasan terhadap reputasi, perwatakan dan kerjayanya dan bagi kesulitan-kesulitan, kebimbangan dan perbelanjaan yang dialaminya akibat tindakan-tindakan defendan-defendan. Daripada memfailkan penyataan pembelaan bagi tuntutan plaintif, defendan-defendan sebaliknya memohon agar ia dibatalkan di bawah A 18 k 19(1)(a) hingga (d) Kaedah-Kaedah Mahkamah 2012 ('KKM'). Alasan-alasan bagi permohonan adalah bahawa kesemua tindakan yang diplidkan dalam pernyataan tuntutan dikekang oleh had masa di bawah s 2(a) Akta Perlindungan Pihak Berkuasa Awam 1948 ('PPBA'); pernyataan tuntutan tidak mendedahkan butir-butir yang cukup dan meyakinkan untuk menyokong pelbagai dakwaan yang dibuat; defendan ke-10 dan ke-11 telah secara salah dijadikan pihak-pihak kepada guaman kerana defendan ke-10 tidak wujud pada masa material dan defendan ke-11 bukanlah entiti guaman yang boleh disaman; dan PR dan timbalan-timbalannya (defendan ketiga dan keempat) kebal sama sekali daripada disaman bagi menjalankan budi bicara pendakwaan. Pada masa material, defendan ketiga dan keempat, masing-masing, merupakan ketua dan timbalan pengarah pendakwaan di

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BPR, defendan kelima merupakan pegawai unit disiplin anggota polis; defendan keenam mengetuai unit penyiasatan BPR manakala defendan ketujuh, kelapan dan kesembilan merupakan pegawai-pegawai penyiasat BPR.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Hujahan bahawa tuntutan terhadap defendan pertama, ketiga dan keempat adalah tidak mampan disebabkan oleh kekebalan mutlak pendakwaan tidak boleh diterima. Penghujahan-penghujahan kehakiman yang kukuh oleh ahli-ahli juris terkenal dalam pelbagai bidangkuasa mengesahkan cadangan bahawa walaupun pendakwa raya kebiasaannya mempunyai kekebalan pendakwaan, dalam keadaan luar biasa di mana kelakuan pendakwa telah didorong oleh tujuan atau niat salah, motif yang melibatkan salahguna atau penyelewengan sistem keadilan jenayah sebagai matlamat, ia tidak direka untuk berkhidmat, atau di mana pendakwa meninggalkan peranan perlembagaannya, kekebalan tidak lagi wajar. Dalam kes sedemikian, tindakan sivil boleh diambil terhadap pendakwa raya (lihat perenggan 63, 74 & 86).

(2) Tanggapan kekebalan pendakwaan mutlak ke atas pendakwa raya dan timbalan-timbalan beliau, yang kesemuanya merupakan pegawai awam, adalah kepada tanggapan akauntabiliti dan kedaulatan undang-undang hari ini. Langkah menjalankan kuasa yang tidak terhad atau budi bicara oleh pegawai-pegawai awam tidak selaras dengan kedaulatan undang-undang. Pegawai awam perlu bertanggungjawab atas tindakan mereka kerana diterima umum bahawa akauntabiliti menggalakkan kedaulatan undang-undang. Setiap kali badan perundangan memperuntukkan imuniti berkanun prosiding undang-undang terhadap pegawai awam, ia seharusnya seiiring dengan syarat bahawa mereka mesti menjalankan kuasa atau budi bicara mereka dengan niat baik. Perisai tidak pernah menjadi suatu yang mutlak (lihat perenggan 76 & 85).

(3) Pliding-pliding mendedahkan kausa-kausa tindakan yang munasabah yang mewajarkan perbicaraan. Pada peringkat prosiding ini, bukanlah bagi mahkamah untuk memutuskan sama ada pelbagai dakwaan yang dibangkitkan dalam pliding benar atau tidak. Dakwaan kekal tidak disangkal. Tanpa satu kenyataan pembelaan dan tanpa penafian dalam afidavit sokongan yang diikrarkan oleh defendan pertama tentang perkara-perkara yang diplidkan dalam pernyataan tuntutan, mahkamah perlu meneruskan seolah-olah fakta yang diplidkan kekal tidak diteliti (lihat perenggan 24 & 77).

(4) Adalah tidak bersesuaian untuk membatalkan pernyataan tuntutan di bawah A 18 k 19(1)(a) KKM kerana ia jelas mendedahkan beberapa kausa tindakan yang faktanya cukup dan diplidkan dan kesemuanya bukanlah mustahil atau jelas tidak mapan dan mewajarkan prosiding

saman yang membawa kepada perbicaraan (lihat perenggan 42).

(5) Kesemua kausa-kausa tindakan yang dibangkitkan dalam pernyataan tuntutan telah difailkan dalam masa yang ditetapkan di bawah s 2(a) PPBA. Berkenaan kausa-kausa tindakan yang diplidkan, masa hanya bermula semasa penolakan pelbagai rayuan jenayah. Plaintif tidak boleh memulakan prosiding sivil terhadap defendan sementara prosiding jenayah telah diatur kerana ia akan menjadi satu cabaran langsung dan kolateral ke atas prosiding jenayah. Dia hanya boleh mendapat remedi sivil apabila tuduhan jenayah telah diputuskan secara muktamad dan ini akan berlaku apabila mahkamah rayuan menolak rayuan-rayuan (lihat perenggan 51–52).

(6) Tiada keperluan untuk membatalkan tuntutan terhadap defendan ke-10 dan ke-11. Dalam kes defendan ke-10, walaupun MACC tidak wujud pada masa tersebut, BPR, adalah, dan perbuatan yang diadukan terhadap beberapa defendan telah dilakukan dalam kapasiti mereka sebagai pegawai BPR. Menurut s 74 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009, apa-apa perbuatan yang dilakukan atau tindakan yang diambil oleh BPR atau pegawainya hendaklah disifatkan telah diteruskan oleh MACC. Oleh itu, MACC, sebagai pengganti BPR, adalah, berdasarkan fakta-fakta yang diplidkan, dengan betul dijadikan defendan dalam tindakan ini. Berhubung defendan ke-11, walaupun ia bukan satu entiti yang sah, plaintif bersedia untuk meminda pliding untuk menggantikan Ketua Polis Negara dengan Polis DiRaja Malaysia sebagai defendan ke-11. Oleh kerana tuntutan boleh diselamatkan dengan pindaan ini, ia tidak boleh terus ditolak. Ini adalah selaras dengan A 15 k 6 KKM (lihat perenggan 87–88).]]]

Notes

For cases on prosecutional discretion, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2236–2237.

Cases referred to

Ahmad bin Hussin v Hajjah Mek binti Hussain [1973] 1 MLJ 18; [1972] 1 LNS 3, FC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Common Cause, A Registered Society v Union of India 1996 AIR SC 3538 (refd)

E Gopal & Anor v Awang bin Mona [1978] 2 MLJ 251, HC (refd)

Elguzouli-Daf v Commissioner of Police and Another [1995] QB 335, CA (refd)

Gasing Heights Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259, HC (refd)

Henry v British Columbia (Attorney General) [2012] BCJ No 1965; 2012 BCSC 1401, SC (refd)

Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors [2003] 5 MLJ 294, HC (refd)
Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289; [2005] 4 CLJ 169, CA (folld)
Law Society of Singapore v Tan Guan Huat Neo Phyllis [2007] SGHC 207; [2008] 2 SLR 239, HC (refd)
Long bin Samat & Ors v PP [1974] 2 MLJ 152, FC (refd)
Malaysian Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 MLJ 425; [1998] 2 CLJ 340, CA (refd)
Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd [2013] 4 MLJ 520; [2013] 8 CLJ 329, CA (refd)
Miazga v Kvello Estate and others [2009] SCC 51, SC (refd)
Nelles v Ontario [1989] SCJ No 86, SC (refd)
Ng Kim Poi (P) & Ors v Pentadbir Tanah Daerah Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed Interveners) [2004] 3 MLJ 301, CA (refd)
Ong Ah Bee v Hii Chung Sing, Robin [1993] 1 CLJ 504, HC (refd)
Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135; [1978] 1 LNS 143, FC (folld)
Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi [1997] 2 MLJ 118; [1997] 2 CLJ 409, CA (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558; [1999] 2 CLJ 886, HC (refd)
Proulx v Quebec (Attorney General), 2001 SCC 66; [2001] 3 SCR 9, SC (refd)
Racz v Home Office, Official Transcripts (1990–1997) Times, 17 December, CA (refd)
Rawther v Abdul Kareem [1966] 2 MLJ 201, FC (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
Riches v Director of Public Prosecutions [1973] 2 All ER 935, CA (refd)
Riga Sdn Bhd v Awang Sepian Haji Awang Joini & 3 Ors [2005] 1 LNS 251, HC (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487, HC (refd)
Roncarelli v Duplessis 16 DLR (2d) 689, SC (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2010] 9 CLJ 389, CA (refd)
Saripah bte Manap & Ors v Emar Sdn Bhd [1998] 1 MLJ 323; [1997] 4 CLJ 194, HC (refd)
Savrimuthu v PP [1987] 2 MLJ 173; [1987] 1 CLJ 368, SC (folld)
See Thong & Anor v Saw Beng Chong [2013] 3 MLJ 235; [2013] 3 AMR 385, CA (folld)
Simmah Timber Industries Sdn Bhd v David Low See Keat & Anor [1999] 5 MLJ 421, HC (refd)
Taib bin Awang v Mohamad bin Abdullah & Ors [1983] 2 MLJ 413, HC (refd)

Johnson Tan Han Seng v PP; Soon Sia Heng v PP v Chea Soon Hoong; Teh Cheng Poh v PP [1977] 2 MLJ 66, FC (refd)
Thilagavathy d/o Durairajoo v Penolong Kanan Pendaftar [2002] MLJU 360; [2002] 1 LNS 148, HC (refd)
Three Rivers DC v Bank of England (No 3) [2003] 2 AC 1, HL (refd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1; [1975] 1 LNS 133, PC (refd)

Legislation referred to

Anti-Corruption Act 1997 (repealed by the Malaysian Anti-Corruption Comission Act 2009) ss 21(4), 32(1)
Anti-Money Laundering and Anti-Terrorism Financing Act 2011 s 77
Constitution of the Republic of Singapore [SG] art 35(8)
Courts of Judicature Act 1964 s 14, 14(1)
Criminal Procedure Code s 376(i)
Emergency (Essential Powers) Ordinance 1969 s 5
Federal Constitution art 145, 145(3)
Internal Security Act 1964 s 57(1)
Malaysian Anti-Corruption Act 2009 ss 72, 74
Police Act 1967
Public Authorities Protection Act 1948 s 2(a)
Rules of Court 2012 O 15 r 6, O 18 r 19(1)(a), (b), (c), (d)

Harvinderjit Singh (Vin Partnership) for the plaintiff.
Cecil WM Abraham (Amarjeet Singh and Rishwant Singh with him) (Zul Rafique & Partners) for the defendants.

Vazeer Alam Mydin JC:

[1] The plaintiff pleads in his statement of claim that he was a highly decorated career police officer with the Royal Malaysia Police ('PDRM') and that during his tenure with PDRM he had risen to the rank of Commissioner of Police and was appointed Director of the Commercial Crimes Investigation Department, Bukit Aman on 2 May 2006.

[2] The plaintiff in paras 2.1–2.12 of the statement of claim identifies the defendants and attributes the following facts to them either jointly or severally.

[3] The first defendant, Tan Sri Abdul Gani Patail, was and is the Attorney General ('AG') of Malaysia appointed under art 145 of the Federal Constitution. The first defendant is also the Public Prosecutor of Malaysia and has the discretion to institute, conduct or discontinue any legal proceedings. The AG has control over all officers of the Attorney General's Chamber ('AGC') who act on his authority.

A **[4]** The second defendant, Tan Sri Musa Hassan, was at the material time the Inspector General of Police ('IGP') appointed under the provisions of the Police Act 1967. The PDRM and its members come under the direct command and control of the second defendant and acted on his authority.

B **[5]** The third defendant, Dato' Nordin Hassan, was at the material time the Head of Prosecutions of the Anti-Corruption Agency ('ACA') and acted under the control, directions and authority of the first defendant.

C **[6]** The fourth defendant, Kevin Anthony Morais, was at the material time a deputy public prosecutor with the AGC and was seconded as the deputy director of prosecution of the ACA and reported to the third defendant and acted on the authority of the attorney general.

D **[7]** The fifth defendant, Chew Kam Soon, was at the material time a police officer holding the rank of Deputy Superintendent of Police serving in the Internal Disciplinary Unit of PDRM. The plaintiff avers that the second defendant had direct control and authority over the fifth defendant.

E **[8]** The sixth defendant, Sok One a/l Esen, was at the material time the head of an investigative unit of the ACA. The plaintiff avers that sixth defendant is subject to the control, supervision and direction of the Director General of the ACA.

F **[9]** The seventh defendant, Saiful Ezral bin Ariffin, was at the material time an investigating officer of the ACA. The plaintiff avers that the seventh defendant is subject to the control, supervision and direction of the Director General of the ACA.

G **[10]** The eighth defendant, Azmi bin Ismail, was at the material time an investigating officer of the ACA. The plaintiff avers that the eighth defendant is subject to the control, supervision and direction of the Director General of the ACA.

H **[11]** The ninth defendant, Wan Abdul Rahman, was at the material time an investigating officer of the ACA. The plaintiff avers that the ninth defendant is subject to the control, supervision and direction of the Director General of the ACA.

I **[12]** The tenth defendant, the Malaysian Anti-Corruption Commission ('MACC'), is the national agency for the prevention of corruption and the successor of the ACA. The plaintiff avers that the MACC is vicariously liable for any act or omission of its officers in the exercise of their powers, functions

and discharge of their duties when exercised or performed in bad faith.

[13] The eleventh defendant, Polis DiRaja Malaysia, is a statutory body set up under the Police Act 1967. The plaintiff avers that the PDRM is the institution responsible for maintenance of law and order, the preservation of peace and security of Malaysia, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence. The plaintiff further avers that the PDRM is vicariously liable for the actions and omissions of its members who participated in the matters complained of in this action.

[14] The plaintiff avers that the twelfth defendant, the Government of Malaysia, is vicariously liable/responsible for the actions and omissions of all members of the PDRM, the AGC and officers of the ACA or the MACC (as the case may be) who had according to the plaintiff participated in the matters complained of in this suit.

[15] The plaintiff avers that between December 1994 and December 2001, the plaintiff and the second defendant served the PDRM as officers in the Criminal Investigations Department, Bukit Aman. During that time the plaintiff was the second defendant's immediate superior officer.

[16] The plaintiff further avers that in or about 2001, the plaintiff was instructed by the then Inspector General of Police, Tan Sri Norian Mai, to issue several show cause letters to the second defendant concerning breaches of discipline, procedure and protocol. The plaintiff states that thereafter the relationship between the plaintiff and the second defendant deteriorated and remained one of guarded enmity.

[17] The plaintiff avers that in September 2006, the second defendant became the IGP and the plaintiff became the Director of the Commercial Crimes Investigations Department ('CCID'). The plaintiff further avers that in order to thwart the plaintiff from his candidacy as the Deputy IGP, the second defendant individually and in combination with the other defendants either combined together jointly or severally subjected the plaintiff to a series of actions in a manner to implicate him for abuse of power, corruption and other crimes orchestrated to injure him and to cause him to be expelled from the PDRM. The plaintiff avers that in this regard there was collusion between the defendants.

[18] The plaintiff also avers that the first defendant had personal enmity for the plaintiff arising from the plaintiff's differences of opinion with the first defendant as regards the prosecution of Tan Sri Tajuddin Ramli in relation to the investigation of criminal impropriety arising from the massive losses

suffered by Malaysian Airline System Bhd ('MAS'). In that case, the plaintiff states that he had at the behest of the Board of Directors of MAS briefed the then Prime Minister, Dato Seri Abdullah Ahmad Badawi (now Tun), that there were factual and legal basis to prosecute Tan Sri Tajuddin Ramli. This was opposed to the decision of the first defendant not to prosecute Tan Sri Tajuddin Ramli. According to the plaintiff, he had informed the Prime Minister that if the first defendant were reluctant to prosecute Tan Sri Tajuddin Ramli, then the CCID would have the necessary resources to conduct such prosecution. This, according to the plaintiff had earned him the first defendant's permanent displeasure.

[19] The plaintiff further avers that in 2007, the first and second defendants enlisted the assistance of the third and fourth defendants, as well as the assistance of various officers of the MACC and the *Unit Tatatertib* of the PDRM, to cause investigations to be made against the plaintiff and subsequently caused him to be charged for various criminal offences in the Kota Kinabalu and Kuala Lumpur Sessions Courts.

[20] The plaintiff also avers that following the order of acquittal by the respective trial courts against all charges, the first defendant had in bad faith caused appeals to be lodged against these acquittals at the High Court and the Court of Appeal. The plaintiff now brings this action following the dismissal of the said appeals, which the plaintiff terms as his final vindication and acquittal.

[21] The plaintiff's pleaded causes of action are found in paras 4–8 of the statement of claim and he claims against the defendants for conspiracy, false and malicious investigation, abuse of power, abuse of prosecutorial discretion, malicious prosecution and prosecutorial misconduct and/or public misfeasance for having acted in such manner against the plaintiff without any reasonable and probable cause and malice and/or acted with ill-will or evil motive and/or with personal spite or acted recklessly or intentionally to injure the plaintiff.

[22] The plaintiff goes on to plead in paras 4.4–4.5 that the defendants were actuated by malice and bad faith and/or with ill-will or evil motive and/or with personal spite or acted recklessly or intentionally to injure the plaintiff without any honest belief that the plaintiff had committed or was guilty of any crime, let alone any probable guilt of the crime imputed. And by reason of the facts pleaded, the plaintiff avers that the defendants cannot invoke any immunity provided by any legislation relating to government immunities or immunities accorded to public officers.

[23] The plaintiff pleads that in consequence of the aforesaid matters, he was injured in his reputation, character and career and put to considerable trouble,

inconvenience, anxiety and expense and has suffered loss and damage including the sum of RM1.5m in legal cost for defending the criminal charges preferred against him. Wherefore, the plaintiff claims, special, general, punitive, aggravated and exemplary damages plus interest and cost.

[24] The defendants did not file defence and instead they have applied vide encl 5 to strike out the plaintiff's claim under O 18 r 19(1)(a) or (b) or (c) or (d) of the Rules of Court 2012 ('ROC'). It is essential to note, that in the absence of the defence and there being no denial in the affidavit in support affirmed by the first defendant of the facts and the matters pleaded in the statement of claim, the court will have to proceed as if the facts pleaded in the statement of claim remains untraversed. The defendants have premised their application mainly on points of law and the grounds of their application can be categorised as follows:

(a) that all the causes of action pleaded in the statement of claim are barred by the Public Authorities Protection Act 1948;

(b) there is lack of sufficient and cogent particulars to support the allegations;

(c) there is misjoinder of the tenth and eleventh defendants as parties to this action as the tenth defendant was not in existence at the material and the eleventh defendant is not a legal entity; and

(d) the first defendant who is the public prosecutor and the third and fourth defendants who are deputy public prosecutors are subject to prosecutorial immunity.

As such the defendants submit that the entire statement of claim ought to be struck out for it does not demonstrate any reasonable cause of action; or is scandalous frivolous or vexatious; or that it may prejudice embarrass, delay the fair trial of the matter; or is an abuse of process.

[25] As the defendants' application is grounded on all four limbs of O 18 r 19(1), I have taken heed of the advise given by the Court of Appeal in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385 and proceeded, firstly, to consider the first limb, ie that the pleadings do not disclose any reasonable cause of action. And in doing so, no reference was made to any of the affidavits filed.

ORDER 18 R 19(1)(a) OF THE ROC — REFERENCE TO PLEADINGS

[26] The principles of law governing an application under O 18 r 19(1)(a) of the ROC have been very well restated by Ramly Ali JCA (now FCJ) in *See Thong & Anor v Saw Beng Chong* [2013] 3 MLJ 235; [2013] 3 AMR 385 in the following terms:

A ... striking out a claim for no reasonable cause of action under sub-para (1)(a) is only appropriate in a plain and obvious case. The learned judge must be satisfied that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief which they asked for. The procedure is a summary procedure. It should only be adopted when it is conspicuously clear that the claim on the face of it is
B obviously unsustainable. Just look at the statement of claim. The test to be applied is whether on the face of the statement of claim, the court is prepared to conclude that the cause of action is obviously unsustainable (see Federal Court decision in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226).

C ... ...

The statement of claim may not be perfect and 'not-so strong' in supporting the appellants' claim; but the mere fact that the case is weak and is unlikely to succeed at trial is not a ground for the claim to be struck out (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (Supreme Court); *Loh Holdings Sdn Bhd v Peglin Development Sdn Bhd & Anor* [1984] 2 MLJ
D 105).

[27] The plaintiff has pleaded the following causes of action:

E (a) conspiracy;

(b) misfeasance by a public officer;

(c) malicious prosecution;

(d) abuse of power;

F (e) prosecutorial misconduct;

(f) abuse of prosecutorial discretion; and

(g) false and malicious investigation.

G **[28]** In applying the principles of striking out a claim for want of any reasonable cause of action, I have scrutinised the statement of claim thoroughly and though I agree with learned counsel for the defendants that eventhough the plaintiff in para 4.1 of the statement of claim has spelt out a number of causes of action against the defendants, as enumerated above; the causes of
H action which have been pleaded with some degree of particularisation are (i) conspiracy to injure, (ii) malicious prosecution and (iii) abuse of legal process. The other causes of action of false and malicious investigation, abuse of power, abuse of prosecutorial discretion and prosecutorial misconduct and/or public misfeasance, though not pleaded with a preferred degree of clarity, could still be
I made out when the facts pleaded are taken in their entirety. This could be ascertained by a perusal of the pleadings to see if the essential elements of each of these torts have been set out therein.

(i) The tort of conspiracy to injure

[29] The elements of the tort of conspiracy to injure are:

(a) the existence of an agreement between two or more persons to do unlawful acts or lawful acts by unlawful means;

(b) the purpose of the agreement is to injure the plaintiff; and

(c) in consequence of the overt acts done in execution of the agreement the plaintiff suffers damage.

See *Simmah Timber Industries Sdn Bhd v David Low See Keat* [1999] 5 MLJ 421 (HC); *Renault SA v Inokom Corp Sdn Bhd* [2010] 4 MLJ 393; [2010] 5 MLJ 394 (CA); *SCK Group Bhd v Sunny Liew Siew Pang & Anor* [2010] 9 CLJ 389, (CA). I find that the plaintiff's averment in paras 4, 5 and 8 of the statement of claim contains sufficient pleadings of facts to sustain a claim for conspiracy.

(ii) The tort of misfeasance in public office

[30] According to the learned authors of Clerk & Lindsell on *Torts* (20th Ed para 14–102, Sweet & Maxwell) the tort of misfeasance in public office has its origin in 'the electoral corruption cases of the late seventeenth century' and was 'expanded in the nineteenth century to cover the liability of judges of inferior courts for malicious acts within their jurisdiction'. The existence of this common law action has been acknowledged by Gopal Sri Ram JCA (later FCJ) in his minority judgment in *Ng Kim Poi (P) & Ors v Pentadbir Tanah Daerah Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed Interveners)* [2004] 3 MLJ 301, it was held that:

> As for the common law, if the appellants are to recover damages in a case as the present, their remedy lies in what Lord Diplock in *Dunlop v Woollahra Municipal Council* [1982] AC 158 described as 'the well-established tort of misfeasance by a public officer in the discharge of his public duties'.
>
> 38 The 5th Edition of de Smith, Woolf and Jowell's Judicial Review of Administrative Action sets out the ingredients of the tort as follows:
>
> A public authority or person holding a public office may be liable for the tort of misfeasance in public office where:
>
> (1) there is an exercise or non-exercise of public power, whether common law, statutory or from some other source;
>
> (2) which is either (a) affected by malice towards the plaintiff or (b) the decision maker knows is unlawful; and
>
> (3) the plaintiff is in consequence deprived of a benefit or suffers other loss.

[31] This tort has now been authoritatively defined by Lord Steyn in *Three*

Rivers DC v Bank of England (No 3) [2003] 2 AC 1 and that pronouncement of the law was adopted and applied by Lau Bee Lan J in *Riga Sdn Bhd v Awang Sepian Haji Awang Joini & 3 Ors* [2005] 1 LNS 251 wherein the learned judge in following the judgment of Lord Steyn summarised the elements of the tort of misfeasance in public office as follows:

(a) the defendant must be a public officer;

(b) the loss to the plaintiff must have been caused by the exercise of power by the defendant as a public officer; and

(c) the act of the public officer must fall either in the targeted malice limb of misfeasance where he acts with intent to harm the plaintiff or the illegality limb of misfeasance where he knows that the act is unlawful and that it will probably injure the plaintiff.

[32] Learned counsel for the plaintiff submits that pleadings giving rise to the cause of action for misfeasance in public office are the same as those pleaded in support of the claim for conspiracy to injure. In this regard, I agree with submissions of counsel for the plaintiff that the deliberate abuse of power by a person holding a public office is tortious and is misfeasance in public office. Such a tortious act can arise when an officer actuated by malice, for example, by personal spite or a desire to injure for improper reasons, abuses his power. Having perused paras 4, 5 and 8 of the statement of claim I find that they contain all the requisite elements of pleadings to support a claim for misfeasance by a public officer.

(iii) The tort of malicious prosecution

[33] The essential elements of the tort of malicious prosecution that the plaintiff needs to plead and prove are:

(a) the defendants set the criminal law in motion against the plaintiff;

(b) that the defendants did not have any reasonable or probable cause for setting the law in motion against the plaintiff;

(c) that the defendants were actuated by malice in the sense that they had a motive other than to carry the law into effect;

(d) that the proceedings terminated in the plaintiff's favour; and

(e) that the plaintiff had suffered damages.

(see *Rawther v Abdul Kareem* [1966] 2 MLJ 201 (FC) for the elements necessary to found a cause of action in malicious prosecution.) Learned counsel for the plaintiff submits that the pleadings on the tort of malicious prosecution are also complete in that the statement of claim shows that:

(a) the first to ninth defendants caused investigations to be commenced

against the plaintiff and criminal charges to be brought against the plaintiff maliciously and without reasonable and probable cause;

(b) the proceedings finally terminated in the plaintiff's favour after the High Court and Court of Appeal dismissed the appeals brought against the acquittals ordered by the sessions courts; and

(c) the plaintiff suffered loss and damages as a result.

[34] I agree with these submissions and further find that the pleadings have particularised the alleged malice and abuse of prosecutorial powers including allegations of:

(a) procuring a false report of corruption and abuse of power against the plaintiff;

(b) unlawfully issuing notices for disclosure under s 32(1) of the Anti-Corruption Act 1997 against the plaintiff;

(c) embellishment of the investigation papers and causing details of the investigations to be published in the mass media in breach of s 21(4) of the Anti-Corruption Act 1997;

(d) preferring charges knowing well that the plaintiff was innocent and/or knowing well that there was insufficient evidence to support any of the charges;

(e) ignoring requests by the plaintiff to investigate the leakages of information to the media;

(f) protracting the trials knowing well that the evidence will not support the charge;

(g) causing numerous amendments to the charge preferred at the Kota Kinabalu Sessions Court despite knowing that there was no case against the plaintiff;

(h) suborning witnesses and wrongfully charging witnesses for perjury; and

(i) lodging appeals against the acquittals to the High Court and Court of Appeal knowing full well that the appeals were unmeritorious.

[35] I am satisfied that the essential elements to found a cause of action in malicious prosecution has been pleaded in the statement of claim, particularly in paras 6.1, 6.3 and 8 thereof. The allegations of prosecutorial misconduct and abuse of prosecutorial discretion are but a part of the building blocks to found the tort of malicious prosecution for they go towards establishing the all important element of malice or improper purpose.

(iv) The tort of abuse of process

[36] The Court of Appeal in *Malaysian Building Society Bhd v Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425; [1998] 2 CLJ 340 held that the essential elements to found a tort of abuse of process are:

(a) the process complained of must have been initiated;

(b) the purpose of initiating that process must be some purpose other than to obtain genuine redress which the process offers, that is, the defendant used the legal process for a predominant purpose that is outside the ambit of the legal claim that the court is asked to adjudicate; and

(c) in consequence thereof, the plaintiff must have suffered some damage or injury.

[37] Learned counsel for the plaintiff submits that there is sufficient pleadings in the statement of claim giving rise to the tort of abuse of process, particularly in paras 4.4, 4.5, 5.3, 5.5–5.14, 5.18–5.27 and 8 of the statement of claim. Having perused the statement of claim, I find that the pleadings contain sufficient averments which in my view are sufficient for the tort of abuse of process, namely, that:

(a) the defendants initiated the process of investigation and prosecution of the plaintiff;

(b) the predominant purpose of the investigations and prosecution was to injure the plaintiff and not to obtain genuine redress that the process offers; and

(c) the plaintiff suffered loss or damage.

[38] Learned counsel for the defendants submits that the causes of action for false and malicious investigation, abuse of power, abuse of prosecutorial discretion and prosecutorial misconduct are not the subject of specific pleas in the statement of claim. Be that as it may, the complaints of abuse of prosecutorial discretion, prosecutorial misconduct, as well as false and malicious investigations fall under the general category of the tort of abuse of power or misfeasance in public office. Neill LJ in *Racz v Home Office, Official Transcripts (1990–1997)* (1992) Times, 17 December recognised and held that:

> The deliberate abuse of power by a person holding a public office is tortious. The tort is usually described as misfeasance in public office.

[39] In *Riga Sdn Bhd v Awang Sepian Haji Awang Joini & 3 Ors* [2005] 1 LNS 251 the learned judge went on to explain the third ingredient of the tort of misfeasance in public office in the following words:

> In respect of the third ingredient ((c) above), which concerns the state of mind of the Defendant, in the case of targeted malice by a public officer ie. conduct specifically

> intended to injure a person or persons it involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The illegality limb operates where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith in as much as the public officer does not have an honest belief that his act is lawful, (per Lord Steyn at page 8 para b–f)

An example of the targeted malice limb of the tort of public misfeasance is the case of *Roncarelli v Duplessis* 16 DLR (2d) 689 where the respondent, Prime Minister and Attorney-General of Quebec deprived the appellant of his restaurant licence as an act of revenge for standing bail for members of the Jehovah's Witnesses sect, against whose activities there had been a campaign. At p 706 the Supreme Court of Canada held that:

> The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the Province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an intrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec.

[40] Thus, the tort of deliberate abuse of power by a person holding public office and the tort of misfeasance in public office is one and the same. As such I do not see the necessity for there to be a specific plea in regards these complaints in the statement of claim. Suffice to say that, notwithstanding the imperfections in drafting complained of by counsel for the defendants, when the statement of claim is read as a whole, it discloses some cause of action and has raised some questions of law and of fact that are sufficiently arguable to justify proceeding to trial (see *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1; [1975] 1 LNS 133 (PC)).

[41] So long as there are some questions of law or issues raised in the pleadings that merits consideration, no matter how slight the chances of success, the court ought not to use its summary powers of dismissal and strike out the action (see *Saripah bte Manap & Ors v Emar Sdn Bhd* [1998] 1 MLJ 323; [1997] 4 CLJ 194; *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558; [1999] 2 CLJ 886).

[42] In the circumstance, I am of the view that it is not appropriate to strike out the statement of claim under O 18 r 19(1)(a) of the ROC for the statement of claim clearly discloses several causes of action which on the facts pleaded are not inherently improbable or obviously unsustainable (see *Bandar Builder Sdn*

Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7 (SC)).

ORDER 18 RULE 19(1)(b), (c) and (d) — REFERENCE TO PLEADINGS AND AFFIDAVITS

I. Limitation under s 2(a) of the PAPA

[43] I will now move on to the application under the remaining three limbs, namely O 18 r 19(1)(b), (c) and (d) of the ROC, and determine the issues and arguments raised by the defendants by reference to the pleadings and the affidavits filed herein. The first issue canvassed by learned counsel for the defendants turns on the application of s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). The defendants' position is that all the claims pleaded in the statement of claim are barred by s 2(a) of the PAPA, which reads:

> Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —
>
> > (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

[44] Learned counsel for the sefendants submits that the suit was filed on 1 November 2013 and that the period of 36 months before filing of the suit takes us to 2 November 2013. Therefore, counsel argues that any cause of action that arose before 2 November 2010 would be time barred under s 2(a) of the PAPA. Learned counsel for the defendants further submits that the plaintiff was charged on 1 November 2007 and 19 November 2007 and acquitted by the court of first instance on 27 July 2009 and August 2010 and that means that the cause of action for false and malicious investigation, abuse of power, abuse of prosecutorial discretion, malicious prosecution and prosecutorial misconduct are time barred.

[45] Learned counsel for the plaintiff, on the other hand argues that all the causes of action are well within the statutory period provided for under s 2(a) of the PAPA. Now, it is trite that when the defence of limitation is raised, it is the plaintiff who bears the burden of proving that the action has been brought within the statutory period (see *Ong Ah Bee v Hii Chung Sing, Robin* [1993] 1 CLJ 504).

[46] I accept the contention that pursuant to s 2(a) of the PAPA, any civil proceeding against the defendants shall not lie unless it is commenced within 36 months from the accrual of the cause of action. The determination of whether an action is time barred has two tiers (see *Ahmad bin Hussin v Hajjah Mek binti Hussain* [1973] 1 MLJ 18; [1972] 1 LNS 3 (FC)). The first is a question of law, that is, when did the plaintiff's cause of action arise. The answer to this question is all-important, as time would begin to run from the date of accrual of the cause of action. And when the cause of action arose would depend entirely on the nature of the particular cause of action. The second is essentially a question of fact to ascertain if the action was commenced within the statutory period, taking into account the date of accrual of the action.

[47] There are several causes of action that the plaintiff has raised in the statement of claim. In order to ascertain if the plaintiff's action has been filed within time, I will first deal with the claim for malicious prosecution. The essential elements of the tort of malicious prosecution, which the plaintiff needs to plead and prove, are:

(a) that the defendants set the criminal law in motion against the plaintiff;

(b) that the defendants did not have any reasonable or probable cause for setting the law in motion against the plaintiff;

(c) that the defendants were actuated by malice in the sense that he had a motive other than to carry the law into effect;

(d) that the proceedings terminated in the plaintiffs favour; and

(e) finally damages must be pleaded and proved.

[48] Thus, a claim for malicious prosecution cannot accrue until the termination of the proceedings in favour of the plaintiff, as that is an essential requirement. And when the proceedings is finally determined is a mixed question of law and fact. Now, the question here is, did the proceedings terminate in favour of the plaintiff when the trial court acquitted him, as submitted by learned counsel for the defendants; or did it terminate on the date on which the prosecution's appeal against the acquittals were dismissed, as is argued by learned counsel for the plaintiff.

[49] Having considered the arguments in some detail, I am of the view that the proceedings terminated in favour of the plaintiff on the date on which the appeal was determined. I say so for the following reasons:

(a) Firstly, in *Taib bin Awang v Mohamad bin Abdullah & Ors* [1983] 2 MLJ 413, Eusoff Chin J (later CJ) held that in an action for malicious prosecution it is essential that the proceedings complained of is 'finally determined'. Further, Mahadev Shankar J (later JCA) in *Gasing Heights*

Sdn Bhd v Aloyah bte Abd Rahman & Ors [1996] 3 MLJ 259 observed that to launch a claim for malicious prosecution, the impugned proceedings must be 'finally resolved'. Both the learned judges have alluded to the proceedings being finally resolved or determined in favour of the accused person before a cause of action in malicious prosecution can be commenced. And to my mind final determination or resolution of a criminal charge can come about only when the proceedings has run its completecourse in its entirety, which would include the trial and appeals, if any.

(b) Secondly, it is well settled that an appeal is a continuation of proceedings (see the judgment of Edgar Joseph Jr J (later FCJ) in *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 as authority for that proposition). And when the public prosecutor filed the notices of appeal against the trial courts' acquittal of the plaintiff, the criminal proceedings continued to the appeal stage and the charges preferred against the plaintiff were still hanging over his head, so to speak, until the appeals were heard and determined. Therefore, when an appeal is pending, it cannot be gain said that the impugned proceedings have been finally resolved. In my opinion that final determination can only come about when the appeal is determined or has run its course.

[50] Now, if, I were to accept the defendants' contention that the cause of action for malicious prosecution accrues upon the trial court's acquittal, an anomalous situation could arise, where the cause of action accrues after the trial court's acquittal and then disappears into thin air if the appeal court reverses the verdict and convicts the plaintiff. Therefore, in order to avoid such incongruity, it is only logical that the cause of action for malicious prosecution accrues upon the determination of the final appeal; which, in this case happened when the appeals lodged by public prosecutor were dismissed in June and November 2011, respectively.

[51] Further, as a rule the plaintiff could not have initiated an action for malicious prosecution nor for any one of the civil causes action pleaded in the statement of claim herein whilst the criminal proceedings, of which he complains as being malicious, has not come to a legal end; as otherwise conflict would arise between the civil and criminal justice systems on issues which properly belongs to the criminal court. Therefore, whilst the charges are alive and criminal proceedings are afoot, it is only proper that the accused person is not afforded the opportunity to attack the criminal prosecution by way of a rearguard civil action in the form of malicious prosecution, or any other civil causes of action, which would entail the collateral litigation of issues which ought to be properly determined by the criminal court without any concurrent proceedings in the civil courts. And for this very reason, the plaintiff could not have initiated civil proceedings against the defendants based on the facts

pleaded herein as the issues were alive in the criminal proceedings in the various criminal courts. Any institution of civil proceedings whilst these criminal proceedings were afoot would have been construed as an indirect and collateral challenge on the criminal proceedings; and this, the courts would not allow. Therefore, the plaintiff can only avail himself of his civil remedies once the criminal charges have been determined with finality; and that occurred when the appellate courts dismissed the appeals.

[52] Therefore, on the facts, I find that the filing of this suit on 1 November 2013 in respect of all the causes of action is well within the time stipulated in s 2(a) of the PAPA.

[53] Further, according to the plaintiff, the acts of the defendants and injury and damage caused to him was such that they continued on until the appeals were determined. In the case of such continuance of injury or damage, counsel for the plaintiff submits that the first limb of s 2(a) of the PAPA does not apply (see *Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri & Ors* [2003] 5 MLJ 294), and time would only begin to run when the injury or damage ceased. I accept the plaintiff's counsel's argument that the acts complained of against the defendants as pleaded herein were continuing acts and gave rise to actionable rights only when the criminal proceedings came to an end. Again that would be when the criminal proceedings were brought to an end with the dismissal of the appeals. That is when the injury or damage ceased and that is when time began to run. Therefore, in respect of all the pleaded causes of action time would begin to run upon the dismissal of the appeals and as such the filing of this action on 1 November 2013 is well within the time stipulated in s 2(a) of the PAPA.

II. Absolute prosecutorial immunity

[54] Learned counsel for the defendants submits that the claim against the first defendant who is the public prosecutor and the third and fourth defendants who are deputy public prosecutors cannot be sustained as they enjoy absolute prosecutorial immunity. The argument of learned counsel for the defendants is that no civil action can be brought against the first, third and fourth defendants in respect of their exercise of their prosecutorial discretion by any aggrieved person even if the action is based on allegations that the exercise of that discretion is not in accordance to law and/or is coloured or tainted by lack of good faith and/or that it was done due to personal spite and/or when there is abuse of the prosecutorial discretion, as is the allegation of the plaintiff in the statement of claim herein. In short, learned counsel for the defendants submits that the first, third and fourth defendants enjoy absolute prosecutorial immunity in respect of their exercise prosecutorial discretion and power, no matter how and for what reason that discretion was exercised.

[55] Learned counsel for the plaintiff submits otherwise and states that the public prosecutor and his deputies do not enjoy absolute prosecutorial immunity in the circumstance of the facts pleaded.

[56] A good starting point to determine this issue would be to look at constitutional principles. There is a separation of the prosecutorial and judicial function in the Federal Constitution and both are given equal status. As co-equals, it is generally accepted that one body may not interfere with the functions of the other, and in this regard the courts have consistently refused to subject the attorney general's exercise of prosecutorial discretion to judicial oversight, with the exception of the power of the court to prevent unconstitutional or unlawful exercise of prosecutorial power.

[57] A long line of case authorities have established that the attorney general's exercise of prosecutorial discretion in respect of his decision to prosecute, or not to prosecute, or to discontinue prosecution, or his decision to amend a charge, or prefer a charge for a less serious offence when there is evidence of a more serious offence, is not justiciable or subject to judicial oversight. These decisions have been in the context of criminal proceedings and vis a vis the attorney general's prosecutorial powers under art 145(3) of the Federal Constitution and s 376(i) of the Criminal Procedure Code (see *Long bin Samat & Ors v Public Prosecutor* [1974] 2 MLJ 152 (FC) and *Johnson Tan Han Seng v Public Prosecutor*; *Soon Seng Sia Heng v Public Prosecutor*; *Public Prosecutor v Chea Soon Hoong*; *Teh Cheng Poh v Public Prosecutor* [1977] 2 MLJ 66 (FC)).These case authorities do not deal with the question of prosecutorial immunity. Therefore, the question of whether the principle absolute prosecutorial discretion translates to absolute prosecutorial immunity was never dealt with in these cases. More importantly, the question of whether the public prosecutor can be open to civil liability in respect of claims of abuse of prosecutorial power, malicious prosecution, or misfeasance in a public office, when the discretion had been exercised with malice or for improper purpose were not dealt with in these cases. These are the questions that this court would have to now answer.

[58] Lord Diplock in giving the advice of the Privy Council in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 had alluded to the fact that the exercise of prosecutorial discretion can be questioned when it had been exercised unlawfully or based on irrelevant consideration. Lord Diplock gave the following advise of the board:

> Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney General of Malaysia by art 145(3) of the Constitution, viz:
>
> The Attorney General shall have power, exercisable at his discretion, to institute,

> conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.
>
> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and *that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.*
>
> If indeed the attorney general was possessed of a discretion to choose between prosecuting the appellant for an offence against s 57(1) of the Internal Security Act, 1964, or for an offence under the Arms Act, 1960, and the Firearms (Increased Penalties) Act, 1971, *there is no material on which to found an argument that in the instant case he exercised it unlawfully.*
>
> (Emphasis added.)

[59] In that dictum of Lord Diplock, there is tacit acknowledgment that though prosecutorial authority is constitutionally vested in the attorney general, the prosecutorial discretion must be exercised for its proper constitutional purpose and not for some unlawful or improper purpose. And that proper constitutional purpose is to uphold the rule of law by enforcing criminal law, as well as maintaining law and order for the greater good of society. Now, if the attorney general as the custodian of prosecutorial power exercises his prosecutorial discretion for other than its constitutional purpose or exercises it based on some irrelevant consideration or exercises his discretion unlawfully or the prosecutorial power is abused for some improper purpose, then that decision can become justiciable and the courts have a duty to render assistance to an individual who has been aggrieved by that decision.

[60] This is in keeping with the pronouncement of Raja Azlan Shah CJM (as HRH then was) in *Pengarah Tanah dan Galian Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; [1978] 1 LNS 143 that:

> Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite (ante) (Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 All ER 625) and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, *it is a stringent requirement that a discretion should be exercised for a proper purpose*, and that it should not be exercised unreasonably. *In other words, every discretion cannot be free*

from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law. I would once again emphasise what has often been said before, that 'public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place', (per Danckwerts LJ in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434442.) (Emphasis added.)

[61] Further in *Savrimuthu v Public Prosecutor* [1987] 2 MLJ 173; [1987] 1 CLJ 368 Salleh Abas LP speaking for the Federal Court held that:

... public interest, reason, and sense of justice demand that any statutory power must be exercised reasonably and with due consideration.

[62] Similar sentiments were echoed by Gopal Sri Ram JCA (later FCJ) in *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289; [2005] 4 CLJ 169 wherein the learned judge held:

In a system of Parliamentary democracy modelled along Westminster lines, it is Parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power — the public body — may be a Minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through Parliament, the ultimate donors of the power. *It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.* (Emphasis added.)

So, in *Premachandra v Major Montague Jayawickrema* [1994] 2 Sri LR 90, at p 105, GPS De Silva CJ when delivering the judgment of the Supreme Court of Sri Lanka said:

There are no absolute or unfettered discretions in public law; *discretions are conferred on public functionaries in trust for the public*, to be used for the public good, and *the propriety of the exercise of such discretions is to be judged by reference to the purposes for which they were so entrusted*. (Emphasis added.)

In the course of his judgment the learned Chief Justice referred to the following passage extracted from *Administrative Law* by HWR Wade (5th Ed):

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely — that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted

permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.

[63] These are strong pronouncements of the law by some of our most prominent jurists. The legal reasoning against unfettered exercise of discretion or power by public officials enunciated in these cases are most compelling and I am bound by the doctrine of stare decisis to apply these principles to the facts of the pleaded case herein and to determine whether the attorney general and his deputies enjoy absolute prosecutorial immunity or whether the immunity can be lifted in appropriate circumstance.

[64] The Singapore Court of Appeal had the occasion to deliberate and decide on the issue of prosecutorial discretion and immunity in *Law Society of Singapore v Tan Guan Huat Neo Phyllis* [2007] SGHC 207; [2008] 2 SLR 239 and Chan Sek Keong CJ, in delivering his landmark judgment held that:

> We have in the preceding paragraphs (see [132] and [138] above) defined an abuse of the criminal process to mean the use of that process for a purpose for which it is not intended, ie, to prosecute an offender for some other ulterior motive and not to punish him for an offence which he has committed. If the Attorney-General initiates such a prosecution, he also abuses his prosecutorial power.
>
> ... ...
>
> Nonetheless, *the courts are not powerless under the law to check or act against an abuse or unconstitutional exercise of prosecutorial power*. Under the law, the Attorney-General must act according to law, as his prosecutorial power is not unfettered. As we have earlier stated, there are two aspects to this. First, he may not use his prosecutorial power in bad faith for an extraneous purpose. Second, he may not use it so as to contravene constitutional rights, such as the right to equality before the law and the equal protection of the law.
>
> ... ...
>
> *The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose it is intended, ie, to convict and punish offenders, and not for an extraneous purpose*. As the Court of Appeal said in *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 156, [86], all legal powers, even a constitutional power, have legal limits. *The notion of a subjective or unfettered discretion is contrary to the rule of law. In our view, the exercise of the prosecutorial discretion is subject to judicial review in two situations: first, where the prosecutorial power is abused, ie, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a discriminatory prosecution which results in an accused being deprived of his right to equality under the law and the equal protection of the law under Art 12 of the Constitution). Authority for this proposition may be found in Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 *('The Cheng Poh'). In that case, although the Privy Council recognised that the unconstitutional exercise of prosecutorial discretion could be*

A *challenged, it held that there was no material on the facts of that case on which to found an argument that the Attorney-General had exercised his discretion unlawfully*. Teh Cheng Poh has been followed by the Court of Appeal in two cases, viz, *Sim Min Teck v Public Prosecutor* [1987] SLR 30 and *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 2 SLR 125. (Emphasis added.)

B

[65] The learned Chief Justice, in echoing the sentiments of HRH Raja Azlan Shah, has very succinctly put that 'the notion of a subjective or unfettered discretion is contrary to the rule of law' and had stated that the prosecutorial discretion of the attorney general is not unfettered and in C appropriate cases, where the exercise of that discretion is unconstitutional, or done in bad faith for an extraneous purpose, or when power is abused, the courts can intervene and redress that wrong. Based on the reasons stated by the learned Chief Justice, I hold that, that is also the position of law in Malaysia in respect of the attorney general's prosecutorial discretion and immunity. It is D worth noting that the constitutional powers of the attorney general in Singapore and Malaysia are in pari materia, and the relevant provision in the Singapore Constitution is found in art 35(8), which reads:

The Attorney-General shall have power, exercisable at his discretion, to initiate, E conduct or discontinue any proceedings for any offence.

[66] In recent years, there have been similar pronouncements of the law in other common law jurisdictions in respect of prosecutorial immunity. The F Supreme Court of Canada in the case of *Nelles v Ontario* [1989] SCJ No 86 had occasion to consider the issue of absolute prosecutorial immunity from suits for malicious prosecution against the attorney general and crown attorneys and held that the attorney general and crown attorneys did not enjoy absolute immunity for malicious prosecution.

G

[67] In coming to the decision that it did, the Canadian Supreme Court considered various arguments forwarded in favour of and against absolute prosecutorial immunity for the attorney general and crown attorneys; and these arguments, as well as the positions taken by the court of first instance, H Court of Appeal and the Supreme Court in *Nelles v Ontario* are well set out in the judgment of RBT Goepel J in *Henry v British Columbia (Attorney General)* [2012] BCJ No 1965 ; 2012 BCSC 1401 and I quote:

C The Nelles Decision

I 17 Ms Nelles was a nurse at the Toronto Hospital for Sick Children. She was charged with the murder of four infant patients. After the case against her was dismissed at a preliminary hearing upon a finding of the absence of evidence, she commenced an action against various parties including the Crown attorneys involved in her prosecution. The claim against the Crown attorneys alleged negligence and, in the alternative, malicious prosecution and false imprisonment.

18 Before trial, the Crown attorneys moved to have the action against them dismissed on the grounds the pleadings disclosed no reasonable cause of action. The question of law put before the court was in these terms:

> A defendant in a preliminary inquiry held under the provisions of the Criminal Code of Canada and discharged thereof has no cause of action based in malicious prosecution or negligence against the Crown Attorneys conducting such proceedings or against those in law responsible for their conduct.

19 In the first instance, Fitzpatrick J of the Supreme Court of Ontario allowed the motion and struck out the statement of claim. He held that the Attorney General for Ontario has an absolute immunity from civil actions while performing his duties as a public prosecutor, even if he acted maliciously.

20 In the Ontario Court of Appeal and the Supreme Court of Canada, the submissions were limited to the question of whether the claim for malicious prosecution could be maintained. The Ontario Court of Appeal, in reasons reported at (1985), 51 OR (2d) 513, 21 DLR (4th) 103, held that prosecutors acting within the bounds of their authority enjoyed an absolute immunity from civil suit for their conduct in initiating and conducting criminal prosecutions. In reaching that decision, it relied extensively on the decision of the United States Supreme Court in *Imbler v Pachtman*, 424 US 409 (1976) (Imbler). While the Court of Appeal found the idea of an absolute immunity 'troubling', it determined that it was justified by the following policy concerns. First, the rule encourages public trust in the fairness and impartiality of those who act and exercise discretion in the bringing and conducting of criminal prosecution; the rule is designed for the benefit of the public not the benefit of the individual prosecutor. Second, the threat of personal liability for tortious conduct would have a chilling effect on the prosecutor's exercise of discretion, and third, to permit civil suits against prosecutors would invite a flood of litigation that would deflect a prosecutor's energies from the discharge of his public duties. In short, the absence of an absolute immunity would open the door to unmeritorious claims and would be a threat to prosecutorial independence.

21 The question facing the Supreme Court of Canada in *Nelles*'s was whether, and to what extent, Imbler should be followed in Canada. The lead judgment was written by Lamer J (as he then was). In his reasons, he recognized there was merit in the policy concerns identified in Imbler and in the Court of Appeal decision but held that there were countervailing policy reasons that mitigated against absolute immunity. In particular, he noted that absolute immunity for prosecutors would prevent a wrongdoer from being held accountable by a victim and would effectively bar the seeking of a remedy under s 24(1) of the Charter. He dismissed concerns that anything less than absolute immunity would have a 'chilling effect' on a prosecutor's exercise of discretion. He noted that in cases of malicious prosecution a plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution and malice in the form of deliberate and improper use of office. Such cases would not be dealing with second guessing a prosecutor's judgment but rather with 'the deliberate and malicious use of office for ends that are improper and inconsistent with the traditional prosecutorial function': *Nelle*'s at pp 196–197.

22 He concluded his analysis at pp 199–200:

> A review of the authorities on the issue of prosecutorial immunity reveals that the matter ultimately boils down to a question of policy. For the reasons I have stated above I am of the view that absolute immunity for the Attorney General and his agents, the Crown Attorneys, is not justified in the interests of public policy. We must be mindful that an absolute immunity has the effect of negating a private right of action and in some cases may bar a remedy under the Charter. As such, the existence of absolute immunity is a threat to the individual rights of citizens who have been wrongly and maliciously prosecuted. Further, it is important to note that what we are dealing with here is an immunity from suit for malicious prosecution; we are not dealing with errors in judgment or discretion or even professional negligence. By contrast the tort of malicious prosecution requires proof of an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve and as such incorporates an abuse of the office of the Attorney General and his agents the Crown Attorneys.
>
> There is no doubt that the policy considerations in favour of absolute immunity have some merit. But in my view those considerations must give way to the right of a private citizen to seek a remedy when the prosecutor acts maliciously in fraud of his duties with the result that he causes damage to the victim. In my view the inherent difficulty in proving a case of malicious prosecution combined with the mechanisms available within the system of civil procedure to weed out meritless claims is sufficient to ensure that the Attorney General and Crown Attorneys will not be hindered in the proper execution of their important public duties. Attempts to qualify prosecutorial immunity in the United States by the so-called functional approach and its many variations have proven to be unsuccessful and unprincipled as I have previously noted. *As a result I conclude that the Attorney General and Crown Attorneys do not enjoy an absolute immunity for malicious prosecution*. (Emphasis added.)

[68] Since the decision in *Nelles v Ontario*, the Supreme Court of Canada had occasion to revisit the issue of prosecutorial immunity and the principles enunciated in *Nelles v Ontario* in two subsequent cases, namely, *Proulx v Quebec (Attorney General),* 2001 SCC 66 ; [2001] 3 SCR 9 and *Miazga v Kvello Estate and others* [2009] SCC 51. In both cases the Supreme Court of Canada had applied and reaffirmed the principles enunciated in *Nelles v Ontario*. In *Proulx v Quebec (Attorney General)*, the court held that:

> Under our criminal justice system, prosecutors are vested with extensive discretion and decision-making authority to carry out their functions. Given the importance of this role to the administration of justice, courts should be very slow indeed to second-guess a prosecutor's judgment calls when assessing Crown liability for prosecutorial misconduct. *Nelles v Ontario,* [1989] 2 SCR 170*, affirmed unequivocally the public interest in setting the threshold for such liability very high, so as to deter all but the most serious claims against the prosecuting authorities, and to ensure that Crown liability is engaged in only the most exceptional circumstances. Against these vital considerations is the principle that the Ministry of the Attorney General and its*

> *prosecutors are not above the law and must be held accountable. Individuals caught up in the justice system must be protected from abuses of power. In part, this accountability is achieved through the availability of a civil action for malicious prosecution.* (Emphasis added.)

And in the case of *Miazga v Kvello Estate and others* the Canadian Supreme Court specifically held that:

> It is readily apparent from its constituent elements that the tort of malicious prosecution targets the decision to initiate or continue with a criminal prosecution. When taken by a Crown prosecutor, this decision is one of the 'core elements' of prosecutorial discretion, thus lying 'beyond the legitimate reach of the court' under the constitutionally entrenched principle of independence: *Krieger v Law Society of Alberta* 2002 SCC 65; [2003] 3 LRC 249 at [32], [46]. *The principle of Crown independence means that decisions taken by a Crown attorney pursuant to his or her prosecutorial discretion are generally immune from judicial review under principles of public law, subject only to the strict application of the doctrine of abuse of process.*
>
> *Just as immunity from judicial review is subject to the doctrine of abuse of process in public law, the Attorney General and Crown attorneys do not enjoy absolute immunity from a suit for malicious prosecution in private law. A person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage.*
>
> However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion. Under the strict standard established in Nelles, malicious prosecution will only be made out where there is proof that the prosecutor's conduct was fuelled by 'an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve' (see [1989] 2 SCR 170 at 199). In other words, it is only when a Crown prosecutor steps out of his or her role as 'minister of justice' that immunity is no longer justified. (Emphasis added.)

[69] The position in England, vis a vis prosecutorial immunity, is not too dissimilar to that which had evolved in Canada. In *Riches v Director of Public Prosecutions* [1973] 2 All ER 935 (CA), in striking out a claim for malicious prosecution against the director of public prosecutions on the grounds of time-bar, Stephenson LJ did not rule out the possibility of an acquitted person succeeding on a claim for malicious prosecution against the prosecutor when the claimant is able to establish malice and lack of reasonable and probable cause for the prosecution. This is tacit acknowledgment that the public prosecutor does not enjoy absolute prosecutorial immunity. This is the observation made by Stephenson LJ:

> I do not wish to be taken as saying that there may never be a case where a prosecution has been initiated and pursued by the Director of Public Prosecutions in which it would be impossible for an acquitted defendant to succeed in an action for malicious prosecution, or as saying that the existence of the Attorney-General's fiat where required conclusively negates the existence of malice and conclusively proves that there was reasonable and probable cause for the prosecution. There may

be cases where there has been, by even a responsible authority, the suppression of evidence which has led to a false view being taken by those who carried on a prosecution and by those who ultimately convicted.

[70] Even though learned counsel for the defendants had during oral submissions advanced the argument of absolute prosecutorial immunity for the first, third and fourth defendants, in his written submissions, counsel concedes that the English position as stated by Stephenson LJ in *Riches v Director of Public Prosecutions* [1973] 2 All ER 935, when analysed, appears to leave the door open for malicious prosecution suits against the director of public prosecutions and his officers where there is suppression of evidence. If that were so, then surely, such a cause of action would be available in circumstances of the facts alleged by the plaintiff in the statement of claim herein.

[71] Further in *Elguzouli-Daf v Commissioner of Police and Another* [1995] QB 335, the plaintiffs were arrested, charged and detained for serious offences, but after some period of detention, the proceedings against them were discontinued by the crown prosecution service ('CPS'). The plaintiffs then brought civil proceedings against, inter alia, the CPS for negligence. Though the claim was for negligence and the issue was whether the CPS owed a duty of care to the claimants, Lord Steyn LJ in delivering the main judgment of the Court of Appeal, by way of a strong obiter, made reference to the operation of the tort of misfeasance in a public office in the context of the facts of that case and held that:

> ... there is the possibility of judicial review of decisions by the CPS. Given the nature of prosecution process it is, however, right to say that the scope for such judicial review proceedings is very limited indeed: *Wiseman v Borneman* [1971] AC 297308; *Nicol v Attorney-General for the State of Victoria* [1982] VR 353; *Dickens, 'The Attorney-General's Consent to Prosecutions*' (1972) 35 MLR 347. *Turning to private law remedies there is first of all the tort of malicious prosecution.* In order to succeed in such an action the plaintiff must prove that the prosecution failed, that there was no reasonable or probable cause for the prosecution and that the defendant was actuated by malice. *It is also necessary to consider the tort of misfeasance in public office.* The essence of the tort is the abuse of public office. Potentially such liability might attach to a decision of a CPS prosecutor. But, as the law stands, the plaintiff has to establish either that the holder of the public office maliciously acted to the plaintiff's detriment or that he acted knowing that he did not possess the relevant power. That is the effect of the decision of the Court of Appeal in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716. In this corner of the law our legal system possibly has a capacity for further development, notably under the direct or indirect influence of the jurisprudence of the European Court of Justice: see Francovich v Republic of Italy (Joined Cases C-6/90 and C-9/90 [1995] ICR 722 and *Kirklees Metropolitan Borough Council v Wickes Building Supplies Ltd.* [1993] AC 227, 281-282, per Lord Goff of Chieveley. But it would be wrong to say more in this case about this complex area of the law. *By way of summary, one can say*

that as the law stands a citizen, who is aggrieved by a prosecutor's decision, has in our system potentially extensive private law remedies for a deliberate abuse of power. (Emphasis added.)

[72] Once again there is clear affirmation by the English Court of Appeal of the principle that the public prosecutor does not enjoy absolute prosecutorial immunity and a person 'who is aggrieved by a prosecutor's decision, has in our system potentially extensive private law remedies for a deliberate abuse of power'. And would include a claim for malicious prosecution and misfeasance in public office.

[73] And subsequently, in *Bennett v Commissioner of Police of The Metropolis And Another* (1997) Times, 24 October, it is reported that Sir Richard Scott, Vice-Chancellor, had held that:

Neither the police nor the CPS was entitled to a blanket immunity. They were liable for malicious arrest and malicious prosecution and for assault if excessive force was used in the course of an arrest.

His Lordship could not therefore see why they should be immune from the tort of misfeasance in public office if the requisite ingredients of the tort were pleaded and made out. *They were subject to the rule of law like anyone else. It was not in the public interest that they should not be*. (Emphasis added.)

[74] Indeed, when the judicial pronouncements in these string of cases are analysed, it reveals a common thread confirming the proposition that though the public prosecutor is ordinarily clothed with prosecutorial immunity, in exceptional circumstance where the prosecutor's 'conduct was fuelled by an improper purpose or motive, a motive that involves an abuse or perversion of the system of criminal justice for ends it was not designed to serve' or where the prosecutor steps out of his constitutional role that 'immunity is no longer justified'. In such cases civil action can lie against the public prosecutor.

[75] In fact the Supreme Court of India in *Common Cause, A Registered Society v Union of India* 1996 AIR SC 3538 had opined that 'no public servant can arrogate to himself the power to act in a manner which is arbitrary' and that 'public servants should be held personally liable for their mala fide acts'. In coming to that opinion, the court held that:

It is high time that the public servants should be held personally responsible for their mala fide acts in the discharge of their functions as public servants ... Public servants may be liable in damages for malicious, deliberate or injurious wrong-doing. According to Wade 'There is, thus, a tort which has been called misfeasance in public office and which includes malicious abuse of power, deliberate maladministration, and perhaps also other unlawful acts causing injury ... if a public servant abuses his office ... an action may be maintained against such public servant. No public servant can say 'you may set aside an order on the ground of mala fide but

you cannot hold me personally liable'. No public servant can arrogate to himself the power to act in a manner which is arbitrary.

[76] These case authorities, both local and from foreign common law jurisdictions, further show that the notion of unfettered exercise of power or discretion by public officials is not consonant with the rule of law and there is a clear move to make public officers accountable for their action, forit is generally accepted that accountability promotes the rule of law. In this regard, the notion of absolute prosecutorial immunity for the public prosecutor and his deputies, who are public officers, is anathema to the modern day notions of accountability and the rule of law. This is in keeping with developments in modern jurisprudence, as can be seen from the cases cited above, that absolute immunity for public officials has no place in a progressive democratic society and is contrary to the rule of law. It must be gain said that in a legal system where the rule of law is central, no one is above the law.

[77] On the pleadings, there are allegations of malice in the form of abuse of prosecutorial power and improper exercise of prosecutorial discretion for an improper purpose. At this stage of the proceedings, it is not for me to decide whether these allegations are true. Suffice to say that these allegations stand uncontroverted at the moment and the court's role at this point in time is to ascertain if, in the event the facts as alleged are proved by the plaintiff at trial, the reliefs sought can flow from the pleaded causes of action. The case authorities cited above have unequivocally held that public officers, including the public prosecutor and his deputies, can be held liable in damages for malicious, deliberate or injurious wrongdoing. In the premise, having considered the facts pleaded, I am of the view that there are reasonable causes of action disclosed in the pleadings that merit a trial.

[78] My view in this regard is further fortified by the statutory immunity provisions found in various statutes. The first, third and fourth defendants maintain that their respective role as the public prosecutor and deputy public prosecutors clothes them with absolute immunity from any action, suit or prosecution. There is, however, no general statutory immunity granted to public prosecutor or his deputies. But, there are some statutory provisions that limit liability for public servants and the government, notably in s 6 of the Government Proceedings Act 1956 and s 72 of the Malaysian Anti-Corruption Act 2009. However, these provisions are nowhere near the absolute immunity contended by the first, third and fourth defendants.

[79] It is would be useful to take a look at the immunity provisions under s 72 of the Malaysian Anti-Corruption Act, 2009, which reads:

> No action, suit, prosecution or other proceedings whatsoever shall lie or be brought, instituted, or maintained in any court or before any other authority against:

(a) the Government of Malaysia;

(b) any officer or employee of the Government of Malaysia or of the Commission;

(c) any member of the Advisory Board or the Special Committee or any other committee established under or for the purposes of this Act; or

(d) any person lawfully acting on behalf of the Government of Malaysia, Commission, officer or employee of the Government of Malaysia or Commission,

for or on account of, or in respect of, any act done or statement made or omitted to be done or made, or purporting to be done or made or omitted to be done or made, in pursuance or in execution of, or intended pursuance or execution of this Act, or any order in writing, direction, instruction, notice or other thing whatsoever issued under this Act:

Provided that such act or such statement was done or made, or was omitted to be done or made, in good faith.

[80] The proviso to s 72 of the Malaysian Anti-Corruption Act 2009, makes it abundantly clear that immunity against actions, suits or prosecution is only available when the act complained of was done in good faith. There is no blanket immunity. A similar immunity provision is found in s 77 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2011, and here too, there is a similar proviso to the effect that the immunity afforded is subject to the requirement of good faith in the exercise of the powers in that statute by any public officer.

[81] This is analogous to judicial immunity granted to judges or persons acting in a judicial capacity under s 14 of the Courts of Judicature Act 1964, where the immunity is not absolute and is subject to the requirement that the judge in good faith believed himself to have jurisdiction to do or order the act complained of. In this regard, it would be apposite to look at s 14(1) of the Courts of Judicature Act 1964, which reads:

No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

[82] Therefore, judicial immunity would only be available when the judge or the judicial officer, had acted in good faith and believed himself to have jurisdiction to carry out the act or make the impugned order (see *Penolong Kanan Pendaftar Mahkamah Tinggi Johor Bahru v Tan Beng Sooi* [1997] 2 MLJ 118; [1997] 2 CLJ 409 and *Thilagavathy d/o Durairajoo v Penolong Kanan*

Pendaftar [2002] MLJU 360; [2002] 1 LNS 148 for the proposition that the shield of judicial immunity is not absolute but can be pierced when the judicial officer had acted mala fides, ultra vires or without jurisdiction).

[83] The term 'good faith' (in the context of the immunity provisions under the Emergency Ordinance) was judicially considered by Syed Agil Barakbah J (later FCJ) in *E Gopal & Anor v Awang bin Mona* [1978] 1 MLJ 251. In that case the issue was whether the public officer concerned could claim protection under s 5 of the Emergency (Essential Powers) Ordinance 1969, in respect of an order that he had made. The learned judge held that:

> ... s 5 is intended to protect any public officer from any suit, prosecution or any legal proceeding in any court for any act ordered or done by him either personally or in his official capacity, during the emergency period for the purpose of maintaining order or public security or for carrying into effect any regulation, order, rule, by-law, direction or notice issued under the Ordinance, provided that his act was done *in good faith and in reasonable belief that it was necessary for the purpose to be served thereby*. (Emphasis added.)

[84] Again, in relation to the Emergency Ordinance, even during the Emergency, immunity from prosecution or legal proceeding granted to a public officer was subject to the requirement of the act having been done in good faith and the learned judge held that the term 'good faith' in the context of that statute:

> ... includes due inquiry and implies not only an upright mental attitude but also clear conscience and that ordinary prudence has been exercised according to the standard of a reasonable person.

[85] So, it can be quite clearly seen that whenever the Legislature provided for statutory immunity from legal proceedings for public officers, it has always come with a rider, and that rider was the requirement of good faith in the exercise of that public officer's powers or discretion. The shield was never an absolute one.

[86] At this stage of the proceedings, the court is only concerned with whether facts are pleaded with sufficient particulars to give rise to such remedies and it would then have to go to trial for the plaintiff to establish his case. Therefore, I am unable to accept the defendants counsel's contention that the claim against the first, third and fourth defendants are unsustainable by reason of absolute prosecutorial immunity.

III. The misjoinder of the tenth and eleventh defendants

[87] I agree with submissions of counsel for the defendants that the tenth defendant is not a legal entity and under the relevant provisions of the Police Act 1967 the action would have to be brought against the Inspector General of Police and not Polis Di Raja Malaysia. However, counsel for the plaintiff submits that it is trite that when any claim can be saved by an amendment, it should not be summarily struck out. I agree with that proposition (see *Metroplex Holdings Sdn Bhd v Commerce International Merchant Bankers Bhd* [2013] 4 MLJ 520; [2013] 8 CLJ 329). Further, O 15 r 6 of the Rules of Court 2012 provides that a cause or matter shall not be defeated by reason of the misjoinder or non-joinder of any party, and that the court may on such terms as it thinks just and either of its own motion or on application order any person who has been improperly or unnecessarily made a party to cease to be a party and/or be substituted with the correct party. The plaintiff's counsel submits, that the plaintiff is ready to amend the writ and statement of claim to substitute the Inspector General of Police in place of Polis DiRaja Malaysia as the tenth defendant. Therefore, I do not see the necessity to strike out the claim against the tenth defendant when such an amendment would cure the defect.

[88] In respect of the eleventh defendant, the Malaysian Anti-Corruption Commission (MACC),though at the material time, the eleventh defendant was not in existence, its predecessor the Anti Corruption Agency (ACA) was and the acts complained of against some of the defendants were done in their capacity as officers of the ACA. I find that by virtue of s 74 of the Malaysian Anti-Corruption Commission Act 2009, any act done or action taken by the ACA or an officer of the ACA shall deemed to have been continued by the MACC, the eleventh defendant herein. Therefore, I agree with submissions of counsel for the plaintiff that the eleventh defendant as the successor of the ACA is on the facts pleaded the proper party to be brought in as a defendant in this action.

[89] Wherefore, encl 5 was dismissed with cost.

Defendants' application dismissed with costs.

Reported by Ashok Kumar